Supreme Court, U.S.
FILED
JAN 21 1993
OFFICE OF THE CLERK

NO. 92-912

IN THE

Supreme Court of the United States

October Term 1992

IN THE MATTER OF: STEVE D. THOMPSON TRUCKING, INC.

Debtor

PRIMROSE OIL CO., INC.

Petitioner

VERSUS

BILLY R. VINING, TRUSTEE

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

I. Does this Honorable Court have jurisdiction over this appeal? Suggested Answer: No.

II. Did petitioner, by failing to object to the report and recommendation of the Bankruptcy Court, waive all objections to the District Court's adoption of the said report and recommendation? Suggested Answer. Yes.

III. Did the District Court commit error when it accepted the unopposed report and recommendation of the Bankruptcy Court and granted summary judgment to the plaintiff in the instant case? Suggested Answer: No.

IV. Did the District Court commit error when it accepted the unopposed report and recommendation of the Bankruptcy Court and held that before a shipper may challenge the reasonableness of a carrier's rate, it must first pay the full tariff rate and then commence a separate rate reparations action to challenge the reasonableness of the carrier's rate? Suggested Answer: No.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Contents of Appendix	iv
Opinions Below	2
Statement of Jurisdiction	2
Statutes Involved	4
Statement of the Case	4
Summary of Argument	5
Argument	5
Conclusion	10
Appendix	1a

Contents

Page

TABLE OF AUTHORITIES

Cases Cited:

Healthcorp of America vs. New Jersey Dental Association, 77 FRD 488 (U.S.D.C. N.J. 1978). 4, 8

In Re Carolina Motor Express, Inc., 949 F.2d 107 (4th Cir. 1991)..... 10

In Re Nantahala Village, Inc., 976 F.2d 876 (4th Cir. 1992)..... 4, 8

Maislin Industries U. S., Inc. vs. Primary Steel, Inc., 497 U.S. 116, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990) 5, 9

Matter of Caravan Refrigerated Express, Inc., 864 F.2d 388 (5th Cir. 1989)..... 10

Northern Pipeline Construction Co. vs. Marathon Pipe Line Co., 458 US 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982)..... 6

T.I.M.E. vs. U.S., 359 US 464 79 S.Ct. 904, 3 L.Ed.2d 952 (1959)..... 5, 9

United States vs. Renfro, 620 F.2d 497 (5th Cir. 1980)..... 8

United States vs. Walters, 638 F.2d 947 (6th Cir. 1981)..... 8

Contents

Page

Statutes Cited:

28 USC 157(c)(1) 2, 4, 6

49 USC 10741 4

Title 49, United States Code 5

Rules Cited:

Bankruptcy Rule 9033 ..... 2, 4, 6, 7, 8, 9

Rule 72 of the Federal Rules of Civil Procedure 8

APPENDIX

Appendix A - Report and Recommendation of the United States Bankruptcy Court for the Western District of Louisiana 1a

Appendix B - Order amending Report and Recommendation of the United States Bankruptcy Court for the Western District of Louisiana to provide for interest. 17a

Appendix C - Judgment of the United States District Court for the Western District of Louisiana. 20a

Contents

Page

Appendix D - Petition for Leave to File Notice of Appeal Nunc Pro Tunc. 22a

Appendix E - Order of the United States District Court for the Western District of Louisiana Granting Petition to File Notice of Appeal Nunc Pro Tunc. 25a

Appendix F - Order of the United States Court of Appeals for the Fifth Circuit dismissing appeal for want of prosecution. 27a

Appendix G - Order of the United States Court of Appeals for the Fifth Circuit reinstating appeal. 29a

Appendix H - Decision of the United States Court of Appeals for the Fifth Circuit. 31a

Appendix I - Decision of the United States Court of Appeals for the Fifth Circuit denying petition for rehearing. 35a

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The Report and Recommendation of the United States Bankruptcy Court for the Western District of Louisiana and the subsequent order of the United States Bankruptcy Court for the Western District of Louisiana amending the said Report and Recommendation; the Order of the United States District Court for the Western District of Louisiana; the opinion of the United States Court of Appeals for the Fifth Circuit; and the opinion of the United States Court of Appeals for the Fifth Circuit on petition for rehearing are made a part hereof as appendixes.

STATEMENT OF JURISDICTION

Billy R. Vining, respondent and the trustee for Steve D. Thompson Trucking, Inc. ("Thompson Trucking"), disputes certain statements contained in the Statement of Jurisdiction submitted by petitioner, Primrose Oil Co., Inc. ("Primrose"). This matter was instituted on behalf of the trustee to recover freight undercharges for the benefit of the bankruptcy estate of Thompson Trucking. The filing of the trustee's complaint instituted Adversary Proceeding No. 91AP-1047 in Bankruptcy Case No. 89BK-12113 on the docket of the United States Bankruptcy Court for the Western District of Louisiana. The jurisdiction exercised by the Bankruptcy Court was that granted by 28 USC 157(c)(1), therefore, the Bankruptcy Court issued a Report and Recommendation pursuant to the provisions of Bankruptcy Rule 9033(a). This Report and Recommendation, not a judgment of the Bankruptcy Court as described by petitioner, was filed on November 12, 1991. The Bankruptcy Court's Report and Recommendation was amended, by an order of the

Bankruptcy Court rendered in Adversary Proceeding No. 91AP-1047, to provide for interest on the principal amount due. As a result of a typographical error on this order, the bankruptcy case number, not the adversary proceeding number, was identified as 89BK-12115.

Primrose failed to file an objection to the Report and Recommendation of the Bankruptcy Court, therefore, the United States District Court for the Western District of Louisiana rendered judgment in favor of the trustee and against Primrose in accordance with the Bankruptcy Court's Report and Recommendation. Subsequent to the entry of the District Court's judgment, Primrose filed a petition to file notice of appeal nunc pro tunc seeking authority to file an appeal from the judgment of the District Court. Note that the petition for leave to proceed nunc pro tunc was filed in the District Court, not the Bankruptcy Court as alleged by the petitioner. After receiving the requested authority, Primrose proceeded to appeal the decision of the District Court to the United States Court of Appeals for the Fifth Circuit. This appeal was initially dismissed for failure of Primrose to file a brief and was subsequently reinstated by order of the Appellate Court. After a consideration of Primrose's appeal, the Court of Appeals affirmed the judgment of the District Court and subsequently denied a petition for rehearing.

The trustee contends that this Honorable Court does not have jurisdiction over this proceeding because Primrose failed to timely object to the Report and Recommendation of the United States Bankruptcy Court for the Western District of Louisiana. In fact, Primrose has never filed an objection to the said Report and Recommendation, therefore, the trustee submits that Primrose has waived all objections to the District Court's adoption of the decision recommended by the

Bankruptcy Judge. *In Re Nantahala Village, Inc.*, 976 F.2d 876 (4th Cir. 1992); *Healthcorp of America vs. New Jersey Dental Association*, 77 FRD 488 (U.S.D.C. N.J. 1978).

STATUTES INVOLVED

Although, as submitted by petitioner, the Court may ultimately be called upon to consider the provisions of 49 USC 10741, the trustee respectfully suggests that before an interpretation of the said statute is required, the Court must consider the provisions of 28 USC 157(c)(1) and Bankruptcy Rule 9033. The pertinent text of the said statutes is set forth within the body of this brief in opposition.

STATEMENT OF THE CASE

The trustee strenuously objects to the statement of case presented by Primrose. Primrose never supported any factual allegation that Thompson Trucking solicited Primrose's business or that Primrose advised Thompson Trucking "that its rates were unreasonably high, and not competitive, and therefore, that it would only tender the freight if the plaintiff offered the defendant competitive rates and that plaintiff agreed to do so." The trustee must initially note a technical inaccuracy in this statement because he, not Thompson Trucking, was the plaintiff in this adversary proceeding. Secondly, the facts only established that Thompson Trucking had billed Primrose for shipping services at a rate less than that established by the tariffs lawfully on file with the Interstate Commerce Commission. After Thompson Trucking filed for bankruptcy, the trustee audited the freight bills prepared in connection with the ship-

ments performed by Thompson Trucking and instituted this action to recover for undercharges.

SUMMARY OF ARGUMENT

Primrose failed to file any objection to the Report and Recommendation of the Bankruptcy Court upon which the District Court based its decision in this proceeding. By failing to object to the Bankruptcy Court's Report and Recommendation, Primrose waived all of its objections to the District Court's adoption of the decision recommended by the Bankruptcy Judge and it is bound by the District Court's judgment. Even if Primrose has not waived its right to challenge the basis for the judgment rendered against it, the trustee shows that the judgment in question was rendered in accordance with the prior decisions of this Honorable Court, the said decisions including *Maislin Industries U. S., Inc. vs. Primary Steel, Inc.*, 497 U.S. 116, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990) and *T.I.M.E. vs. U.S.*, 359 US 464, 79 S.Ct. 904, 3 L.Ed. 952 (1959).

ARGUMENT

The petitioner contends that this appeal presents important and substantial questions concerning certain issues of law raised by a review of Title 49 of the United States Code. Primrose also contends that it will be irreversibly harmed if this Honorable Court denies the application pending before it. As will be seen hereinbelow, Primrose has had its opportunity to raise the issues which it now deems important, but failed to do so in the manner prescribed by law. As a result, any harm which Primrose may suffer as a

result of the denial of this writ application is a direct result of its own inaction.

A consideration of this application must begin with a review of Section 157 of Title 28 of the United States Code, the said statute having been drafted in response to the decision of this Honorable Court in the case of *Northern Pipeline Construction Co. vs. Marathon Pipe Line Co.*, 458 US 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982). Subparagraph (c)(1) of Section 157 states as follows:

> "A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected."

Bankruptcy Rule 9033 establishes the procedure through which the provisions of 28 USC 157(c)(1) are implemented. The cited rule provides, in relevant part, as follows:

> "(b) Objections: Time for Filing. Within ten (10) days after being served with a copy of the proposed findings of fact and conclusions of law a party may serve and file with the Clerk written objections which identify the specific proposed findings or conclusions objected to and state the grounds for such

> objection. A party may respond to another party's objections within ten (10) days after being served with a copy thereof. . .
>
> (d) Standard of Review. The district judge shall make a de novo review upon the record or, after additional evidence, of any portion of the bankruptcy judge's findings of fact or conclusions of law to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the proposed findings of fact or conclusions of law, receive further evidence, or recommit the matter to the bankruptcy judge with instructions."

In the case at bar, the United States Bankruptcy Court for the Western District of Louisiana issued its report and recommendation on November 12, 1991. The last paragraph of the said report and recommendation specifically stated as follows:

> "Pursuant to Bankruptcy Rule 9033(b), failure of the parties to request reconsideration and to file specific written objections with the Clerk of Court within the delays set forth in Bankruptcy Rule 9033 will result in a judgment in accordance with this Report and Recommendation being ordered by the District Court."

Despite the statutory provisions cited hereinabove and the express warning contained in the Bankruptcy Court's Report and Recommendation, Primrose failed to file any objection

to the findings of the Bankruptcy Judge. As a result, the District Judge adopted the recommendation of the Bankruptcy Court and granted judgment in favor of the trustee.

It is respectfully submitted that the jurisprudence supports the Fifth Circuit's opinion that Primrose waived any right to complain of the adoption of the Bankruptcy Judge's report and recommendation when it failed to file a timely objection thereto. *In Re Nantahala Village, Inc.*, 976 F.2d 876 (4th Cir. 1992). See also *United States vs. Walters*, 638 F.2d 947 (6th Cir. 1981) and *Healthcorp of America vs. New Jersey Dental Association*, 77 FRD 488 (U.S.D.C. N.J. 1978) interpreting Rule 72 of the Federal Rules of Civil Procedure which served as the model for Bankruptcy Rule 9033. The failure of the petitioner to bring issues of law and fact before the District Court precludes the petitioner from raising the same issues before either the Court of Appeals or this Honorable Court. *United States vs. Renfro*, 620 F.2d 497 (5th Cir. 1980). As noted in the *Nantahala Village* decision, to hold otherwise would defeat the procedural framework that Congress has established to facilitate the judicial work of the district court. The granting of this writ application would also permit Primrose to avoid the responsibilities placed upon a party involved in an adversary proceeding.

Primrose seeks to excuse its procedural failures based upon the filing of a petition for leave to file notice of appeal nunc pro tunc. A review of Primrose's petition to this Honorable Court evidences that the petitioner, in its statement of jurisdiction, alleges that it filed a "Petition for Leave to Proceed Nunc Pro Tunc in the Bankruptcy Court" and that this petition was granted by the District Court. This is simply not the case because the petition was, in fact, filed in the

District Court and only sought authority to file a notice of appeal to the United States Court of Appeals for the Fifth Circuit. The petition in question was filed on January 17, 1992, well after the issuance of the judgment of the United States District Court for the Western District of Louisiana dated December 23, 1991. Note that the district court's judgment was complete as initially issued in that it fixed all damages awarded to the trustee, including the interest thereon. The purpose of the petition nunc pro tunc was clearly not to request a Bankruptcy Rule 9033(c) extension of time to object to the Bankruptcy Judge's proposed findings of fact and conclusions of law which were issued in November of 1991. Instead, the filing of this petition was a procedural maneuver by Primrose in an attempt to insure that its deadline for appealing the decision of the District Court would not expire.

The fact is that Primrose did not, timely or otherwise, file an objection to the Report and Recommendation of the Bankruptcy Judge. As a result, it must be considered as having waived its right to object to the Bankruptcy Judge's findings on those issues which Primrose now argues are so important and substantial. As noted hereinabove, any harm which Primrose may suffer is solely a result of its own inaction. The trustee submits that the potential for such harm is limited because the Bankruptcy Judge's conclusions and finding and the District Judge's judgment were both based upon the prior decisions of this Honorable Court in *Maislin Industries U.S., Inc. vs. Primary Steel, Inc.*, 497 U.S. 116, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990); and *T.I.M.E vs. U.S.*, 359 US 464, 3 L.Ed.2d 952, 79 S.Ct. 904 (1959). The lower courts, in light of these and other decisions, held that Primrose was not entitled to raise the reasonableness of the rates charged by Thompson Trucking as a defense to this liti-

gation by the trustee unless it first paid the full tariff rate. See also *Matter of Caravan Refrigerated Express, Inc.*, 864 F.2d 388 (5th Cir. 1989) and *In Re Carolina Motor Express, Inc.*, 949 F.2d 107 (4th Cir. 1991). The District Court did not, of course, issue any order which would prevent Primrose from bringing an action for the recovery of reparations. This remedy is still available to Primrose and it provides the petitioner a means of avoiding any harm which it might suffer as a result of the denial of this petition for writ of certiorari.

CONCLUSION

For the foregoing reasons, Billy R. Vining, Trustee for the bankruptcy estate of Steve D. Thompson Trucking, Inc. respectfully submits that Primrose Oil Co., Inc. waived its right to bring before this Honorable Court the issues which it contends are presented by this litigation. Even if this Honorable Court were to consider the issues presented, the judgment of the district court is in accord with the previous orders of this Honorable Court and there is no basis for reversing that judgment. Accordingly, Billy R. Vining, Trustee, submits that this Honorable Court should deny the petition for writ of certiorari and the alternative motion of Primrose Oil Co. for an order staying all proceedings in this matter.

Respectfully submitted,
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Appendix A

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

IN RE: STEVE D. THOMPSON TRUCKING, INC.

NO. 89BK-12113

BILLY R. VINING, TRUSTEE

VERSUS

NO. 91AP-1047

PRIMROSE OIL CO., INC.

REPORT AND RECOMMENDATION

This matter came before the Court on the Motion for Summary Judgment filed by the trustee, Billy R. Vining, against defendant, Primrose Oil Co., Inc. (hereinafter referred to as "Primrose" or "defendant"). A hearing was held on the Trustee's Motion for Summary Judgment on October 2, 1991 wherein this Court stated that it would issue a Report and Recommendation containing proposed findings of fact and conclusions of law pursuant to Bankruptcy Rule 9033(a). The Court indicated following the conclusion of the argument on the Motion for Summary Judgment that it would recommend the Trustee's Motion for Summary Judgment be GRANTED IN PART AND DENIED IN PART.

Appendix A

The Court has utilized the Report and Recommendation process (or proposed Findings of Fact and Conclusions of Law) as required by Bankruptcy Rule 9033(a) because the Court is presently of the opinion that the jurisdiction it exercises is that granted by 28 USC 157(c)(1).

PROCEDURAL HISTORY AND FACTUAL FINDINGS

The Court finds the following factual procedural history of this matter. On August 30, 1989, Steve D. Thompson Trucking, Inc. (hereinafter referred to as the "debtor" or "Thompson") filed for relief under Chapter 11 of the Bankruptcy Code. The case was subsequently converted to one under Chapter 7 of the Bankruptcy Code on October 5, 1989 at which time Billy R. Vining was appointed trustee of the debtor. The trustee filed this adversary proceeding against the defendant, Primrose, on March 20, 1991, seeking to collect freight undercharges.

The debtor provided interstate transportation services to defendant at negotiated rates below the rates in applicable published tariffs. After the trustee was appointed he caused a post-petition audit of the books and records of the debtor to be undertaken. That audit discovered undercharges on previous freight bills to the defendant. The defendant was billed for the difference, it refused to pay and the trustee instituted the adversary proceeding to collect the claimed undercharges.

The trustee accompanied his Motion for Summary Judgment with two affidavits in support of the motion, one

of Charles E. Shinn, a freight bill auditor and analyst, and the other by Billy R. Vining, the trustee, together with a Memorandum in Support of the Motion for Summary Judgment, all filed on August 9, 1991. The defendant filed a response to the Motion for Summary Judgment together with an affidavit of Byron Falk. The affidavit of Mr. Falk alleged that tariffs not utilized by Mr. Shinn in his affidavit were applicable. In response to the defendant's position, the trustee filed a supplemental memorandum wherein he addressed the defenses raised by Primrose. For the reasons hereinafter stated the Court finds that none of the tariffs set out by Mr. Falk in his affidavit are applicable to the shipments of defendant. The Court further finds that the affidavit of Mr. Falk did not point out specific material facts over which there was a genuine dispute and therefore the plaintiff was entitled to summary judgment.

The Court finds from the affidavits filed that the books and records of the debtor indicated that the defendant paid plaintiff originally for each of the freight bills sued upon in the amounts shown on the original freight bill, but that those original freight bills and the discounts shown thereon were not based upon valid and filed tariffs with the Interstate Commerce Commission. The 450 audited freight bills and the amounts due shown thereon in the attachments to Mr. Shinn's affidavit correctly show, in principle, the additional amounts due on each freight bill under tariffs lawfully filed with the Interstate Commerce Commission. The shipments were in Interstate Commerce when carried by the debtor pursuant to a bill of lading for each freight bill which was then corrected by Mr. Shinn. The defendant paid the original billing amount acknowledging receipt of the shipment. The facts described in the affidavits of Mr. Shinn and

Mr. Vining were not controverted by the affidavit of Mr. Falk and are therefore accepted by the Court. Based upon these affidavits, the Court finds that the principal sum of $9,060.28 is due from Primrose to the plaintiff.

As to the tariffs set out by Mr. Falk in his affidavit, the Court finds that factually and legally none are applicable to the shipments made for this defendant.

DISCOUNT TARIFF 104

Discount Tariff 104, as shown by its face sheet, was effective June 27, 1987. A number of the charges shown in Plaintiff's Motion or Summary Judgment occurred prior to that date. Furthermore all of the items under this tariff which were referenced by Mr. Shinn require under their general provisions the following to be applicable:

> "[2] THE DISCOUNT IN THIS ITEM APPLIES ONLY WHEN THE SHIPPER AND/OR CONSIGNEE IS NOTIFIED BY THE CARRIER THAT IT IS A PARTICIPANT IN THIS ITEM. THE NOTIFICATION FORM WILL SPECIFY THE ORIGIN(S) AND/OR DESTINATION(S) FROM AND/OR TO WHICH THE DISCOUNT WILL APPLY.
>
> [3] THE NOTIFICATION FORM REQUIRED IN [2] MUST BE SIGNED BY THE CARRIER'S DIRECTOR OF TRAFFIC AND AN AUTHORIZED SALES REPRESENTATIVE OF THE CARRIER.

Appendix A

[4] THE MINIMUM CHARGE FOR A SINGLE SHIPMENT SHALL BE PROVIDED IN THE SECTION OF ITEM 300 OF THIS TARIFF SPECIFIED IN THE NOTIFICATION FORM."

The defendant provided no proof that it was a participant under the abovestated provisions of Discount Tariff 104. It provided no notification form which was signed by the debtors Director of Traffic and an authorized sales representative of the debtor. Therefore, the defendant did not participate in Discount Tariff 104.

DISCOUNT TARIFF 100

The discounts allowed under this tariff only apply pursuant to its general provisions in paragraph [1] on shipments "handled jointly with Southeastern Freight Lines, Inc. and interchanged in Atlanta, GA. and then only when the discount is shown on the freight bill at the time of interchange." There is no factual allegation whatsoever by defendant that any of the shipments were handled jointly with Southeastern Freight Lines, Inc.; the freight bills themselves attached to plaintiff's Motion for Summary Judgment show no such interline. Indeed the vast majority of the freight bills are between Louisiana and Texas and obviously would not be interchanged in Atlanta, Georgia. There is no evidence whatsoever that there was any interchange in Atlanta, Georgia or that Southeastern Freight Lines, Inc. jointly handled the shipments at issue. Accordingly, THST 100 is not applicable to defendant's shipments sued upon.

Appendix A

CONCLUSIONS OF LAW

Rule 56(c) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Bankruptcy Rule 7056 provides in part:

> "The judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that the moving party is entitled to judgment as a matter of law."

The Court finds that considering the pleadings and affidavits and attachments thereto filed, there is no genuine issue as to material fact and that plaintiff is entitled to judgment as a matter of law.

A defendant resisting summary judgment must point out specific facts showing that there is a genuine dispute. *Anderson vs. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202, 217 (1986). Summary judgment is an integral part of the Federal Rules of Civil Procedure; it is not a disfavored procedural shortcut. It is "designed" to secure the just, speedy and inexpensive determination of every action. *Cellotex Corporation vs. Catrett,* 477 U.S. 317, 327, 106 S.Ct. 2548, 2555, 91 L.Ed.2d 265, 276 (1986).

Recently in *Maislin Industries U.S., Inc. vs. Primary Steel, Inc.*, 497 U.S. _____, 110 S.Ct. 884, 111 L.Ed.2d

94 (1990) the Supreme Court reaffirmed its longstanding precedent that neither the Interstate Commerce Commission nor an agreement between a shipper and a carrier could absolve the shipper of the requirement to adhere to the carrier's filed tariff.

The carrier's filed tariff rates are presumed reasonable. *Maislin,* supra; *Louisville & N.R.R. vs. Maxwell,* 237 U.S. 94 (1915); *Arizona Grocery vs. Atchinson, T & S.F.R.,* 384 U.S. 370, 384. The defendant alleged as an affirmative defense in its answer and in oral argument on the Motion for Summary Judgment that the rates sought to be collected are not reasonable. The issue of rate reasonableness does not constitute a defense to an action to collect freight charges. The reparations remedy set by statute provides the sole and exclusive remedy for claimed excessive charges. *Mohasco Industries, Inc. vs. Acme Fast Freight, Inc.,* 491 F.2d 1082, 1084 (5th Cir. 1974), cert. den., 419 U.S. 842, 95 S.Ct. 74, 42 L.Ed.2d 70 (1974); *United States vs. Associated Transport, Inc.,* 505 F.2d 366, 370 (D.C. Cir. 1974). Furthermore, before a shipper may challenge the reasonableness of a carrier's rate, it must first pay the full tariff rate and then commence an action for reparations under the statute. *Matter of Caravan Refrigerated Cargo, Inc.,* 864 F.2d 388, 391 (5th Cir. 1989), cert. den. _____ U.S. _____, 110 S.Ct. 3254, 111 L.Ed.2d 763 (1990). The Court finds it noteworthy that certiorari was denied in *Caravan* four days *after Maislin* was decided. Even if the unreasonableness of the debtor's rates would have been a defense in this action, Primrose completely failed to show that there existed any issue of material fact concerning the reasonableness or the applicability of the rates in the tariffs utilized in reaching the amount of the undercharges.

Appendix A

The Third Circuit Court of appeals recently noted, in a case such as the matter at bar, primary jurisdiction cannot be invoked by mere pleading:

> We remind counsel that phrasing an issue as a matter of tariff construction or as a question of reasonableness does not determine the issue of primary jurisdiction. *Western Pacific R.R.*, 352 U.S. at 68-69. As the Supreme Court noted "to hold otherwise would make the doctrine of primary jurisdiction an abstraction to be called into operation of the whim of the pleader." Id. at 69.

Delta Traffic Service vs. Occidental Chemical, 846 F.2d 911 (3rd Cir. 1988) n.7.

In a comparable case, the United States Supreme Court held that once a tariff becomes effective, any nullification of that tariff can only act prospectively. *ICC vs. American Trucking Associations, Inc.*, 467 U.S. 354, 104 S.Ct. 2458, 81 L.Ed.2d 282 (1984). It is a necessary corollary of that position that rulings on the reasonableness of rates may also be made only as to their prospective application. *Matter of Caravan Refrigerated Cargo, Inc.*, supra. The ICC concurs, given its own concession as stated above, and given the prospective tenor of its regulations on proceedings before it and in compliance with ICC decisions. 49 C.F.R. Chapter X, Subchapter B, Sec. 1101.1 et seq.

It is well settled that the burden of proving an existing rate to be unreasonable is upon the shipper. *Central of Georgia R.R. Co. vs. United Clay Procedures Tariff Assn.,*

379 F.Supp. 976, 978 (D.D.C. 1974) aff'd 421 U.S. 957 (1975). This burden remains upon the shipper even if a carrier presents no evidence regarding the reasonableness of its rates. At no time has defendant even alleged any *factual* evidence concerning the reasonableness of rates plaintiff seeks to assess.

The defendant failed to present any relevant evidence concerning the unreasonableness of the rates sought to be collected; it failed to raise any issue of material fact regarding rate reasonableness and therefore that affirmative defense cannot be considered.

The defendant also raised certain "equitable defenses" in its answer and in oral argument such as estoppel, laches and the like.

The United States Supreme Court has consistently held that carriers subject to the Interstate Commerce Act must collect, and shippers must pay, all lawful charges set forth in the applicable tariffs. In *Louisville & N.R.R. vs. Maxwell,* 237 U.S. 94, 97 (1915) the Court said:

> Under the Interstate Commerce Act, the rate of the carrier duly filed is the *only* lawful charge. *Deviation from it is not permitted upon any pretext.* (Emphasis added)

In *Armour Packing Co. vs. United States,* 209 U.S. 56, 81 (1908), the Court announced the following rationale for this rigid rule:

> If the rates (filed and published as required by

> law) are subject to secret alteration by special agreement, then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart.

The Supreme Court and the Circuit Courts of Appeals have applied this rule of law every time they have addressed the issue of "equitable" defenses to adherence to lawful common carrier rates. See, e.g., *Thurston Motor Lines vs. Jordan K. Rand.*, 460 U.S. 533 (1983), (carrier awarded differences between agreed upon "contract rates" and published rates); *Illinois Central Gulf R.R. Company vs. Golden Triangle Wholesale Gas Company,* 586 F.2d 588, 592 (5th Cir. 1978) (estoppel defense rejected, storage charges in tariff applied despite repeated assurances by carrier that they would not apply); *Nyad Motor Freight, Inc. vs. W.T. Grant Co.*, 486 F.2d 1112, 114 (2nd Cir. 1973) (filed rate applied despite non-filed contract of parties to apply lower rate); *Inman Freight Systems, Inc. vs. Olin Corp.*, 807 F.2d 117, 121 (8th Cir. 1986) (filed rate doctrine applied even when there has been intentional or inadvertent misquotation of rates and the estoppel defenses not available in a suit for undercharges where a carrier misquotes rates); *Chicago V & R Co. vs. Ready Mix Concrete Co.*, 487 F.2d 1263, 1267 (8th Cir. 1973); *Bower & Dudley vs. Knox Glass, Inc.*, 390 F.2d 193, 196 (3rd Cir. 1968); and *Norfolk & Western R. Co. vs. American Comp. St. Corp.*, 181 F.2d 183, 184 (6th Cir. 1950).

The "filed rate doctrine" is so absolute that a claim for relief from the filed rate cannot even be predicated on a carrier's alleged fraudulent or intentional misquotation of

rates. Additionally, as a matter of law, the shipper is conclusively presumed to know the terms of the tariff, and, therefore, cannot claim deceit or false representation when the rate charged is at a variance with the tariff provisions. *Paulson vs. Greyhould Lines, Inc.*, 628 F.Supp. 888 (D.Minn.), aff'd 804 F.2d 506 (8th Cir. 1986).

There is no prohibition contained in the law or the Interstate Commerce Commission regulations against the publication of motor carrier rates for a named shipper. 49 C.F.R. 1312.14(a)(c) provides "Rates may be published to apply from or to a named plant site, construction site, or other site, if its location is identified. Rates may be published for the account of a specifically named shipper or receiver." This provision was enacted by the Interstate Commerce Commission in 1964 in, *Rates For A Named Shipper Or Receiver* Ex Parte No. MC-158, 367 ICC 959, 1984 Fed. Car. Cases 37,088.

The Courts precluded assertion of either estoppel or a claim for fraud where the result would be a rate preference. *Missouri Pacific R.Co. vs. Rutledge Oil Co.*, 669 F.2d 557, 559 (8th Cir. 1982). In fact, in each instance where fraud or unfair practice was alleged by the shipper as either a defense or in the form of a counterclaim, the courts have consistently refused to recognize such a cause of action.

In *Pettibone vs. Richardson*, 126 F.2d 969 (7th Cir. 1942), in defense of an action for collection of undercharges, the defendant pleaded a counterclaim alleging that he had been damaged by the failure to the plaintiff to post the proper rates and by the negligence of plaintiff's agents in furnishing the incorrect rates to the defendant. The court refused to recognize such an action, reasoning that:

> It is clear that the Defendant, having sold the livestock on the cost-plus basis, has suffered a loss, but the decisions are definite to the effect that under the present state of facts the railroad is not liable for this loss. To allow the Defendant to recover would, in substance allow the railroad to grant a rebate (Citations omitted). The failure of the railroad to post tariffs in this station does not alter the rule. (Citations omitted).

The defendant is conclusively presumed to know the proper rates. (Citations omitted). Therefore, the Defendant has no right to rely on the railroad's quotation of rates, and no failure of duty on the part of the railroad renders it liable for Defendant's loss. Although the Defendant's counterclaim relied upon the rates quoted by the railroad company, which were incorrect, he must not only pay the correct rates to the railroad company, but he is without remedy against the railroad company for the damage he may have suffered in reliance upon the incorrect rates quoted. He is bound to pay the correct rates, and what the correct rates are he is bound to know. *Id.* at 970.

In *F. Burkhart Mfg. Co. vs. Fort Worth & D.C. Ry. Co.*, 149 F.2d 909 (8th Cir. 1945), the appellate court, in affirming the lower court's decision to award the carrier undercharges due and dismissing the defendant's defense and counterclaim, stated that the defendant:

> . . .was charged with knowledge of the lawful rate, and that. . .it became obligated as a matter of law to pay any uncollected balance

> of the freight charges, regardless of any acts or omissions of the carrier. [And] *one who was conclusively presumed and legally bound to know the tariff rate, cannot be heard to say that it was deceived or damaged by false representations about the rate.* (Emphasis supplied).*Id.* at 910.

In *Consolidated Freightways vs. Terry Truck, Inc.*, 612 F.2d 465 (9th Cir. 1980), the Ninth Circuit reached the same result. Consolidated Freightways, a motor carrier, filed suit against Terry Truck, for alleged undercharges. Terry Truck counterclaimed, alleging that the carrier knowingly misquoted the applicable shipping rate. The Court dismissed the counterclaim for failure to state a cause of action, holding that "no claim for relief can be predicated on a carrier's alleged fraudulent misquotation of tariffs." *Id.* at 466.

In Aero Trucking, Inc. vs. Regal Tube Co., 594 F.2d 619 (7th Cir. 1979), Aero, an interstate motor carrier, sued Regal for certain freight undercharges. Regal claimed that Aero fraudulently misrepresented the applicable freight charges and therefore was estopped from collecting said charges. In addition, Regal filed a third party complaint against an employee of the carrier who allegedly quoted the incorrect rate. Regal claimed that if it was found liable to Aero, then it was entitled to a judgment against the employee. With respect to Regal's affirmative defense, the Court held that estoppel was not a defense for an action for freight charges. Although the Court acknowledged that Regal may not have employed Aero if it had been aware of the actual tariff charges, it noted that this was true in all undercharge cases. The Court also dismissed Regal's action

against Aero's employee holding that since Regal is conclusively presumed to know the tariff rate, no suit can be predicated upon Regal's reliance on Aero's employee's erroneous statements regarding the tariff rate. *Id.* at 623.

The debtor also sought prejudgment interest on its claim. The Court finds that the law is well settled that in a tariff undercharge case the plaintiff is entitled to prejudgment interest as a mandatory element of damages. *Louisiana & Arkansas Railway Co. vs. Export Drum Co.*, 359 F.2d 311 (5th Cir. 1966); *Southern Pacific Transportation Co. vs. San Antonio, Tex.*, 748 F.2d 266, 274 (5th Cir. 1984).

With respect to the computation of such interest, in this case there is a material issue of fact. Accordingly, a hearing has been set for November 20, 1991, at 1:30 p.m. to consider evidence presented with respect to the issue of the amount of interest accumulated on this claim.

CONCLUSION

Based on the foregoing discussion, it is the recommendation of this Court to the District Court that the Motion for Summary judgment filed by Billy R. Vining, Trustee, be granted in part and denied in part and that there be judgment in this adversary proceeding in favor of Billy R. Vining, Trustee of Steve D. Thompson Trucking, Inc. and against defendant, Primrose Oil Co., Inc., in the principal sum of $9,060.28, together with interest on each freight shipment as determined at the hearing on November 20, 1991, together with the costs of court in this proceeding of $120.00.

Appendix A

Pursuant to Bankruptcy Rule 9033(b) failure of the parties to request reconsideration and to file specific written objections with the Clerk of Court within the delays set forth in Bankruptcy Rule 9033 will result in a judgment in accordance with this Report and Recommendation being ordered by the District Court.

IT IS SO ORDERED.

THUS DONE AND SIGNED in Shreveport, Louisiana, this 8th day of November, 1991.

s/Stephen V. Callaway

STEPHEN V. CALLAWAY
CHIEF JUDGE,
U. S. BANKRUPTCY COURT

Copy Sent:
Date: 11/12/91
By: TD
To: Per Attached

Appendix A

Notice sent to:

Michael E. Kramer
604 Kinloch St.
Winnsboro, LA 71295

Joseph T. Bambrick, Jr.
529 Reading Ave.
West Reading, PA 19611

Louis D. Smith
P. O. Box 8032
Monroe, LA 71211-8032

Stephen J. Katz
411 S. Washington St.
Bastrop, LA 71220

E. Eugene Hastings
P. O. Drawer 2808
Monroe, LA 71207-2808

Steve D. Thompson Trucking
P. O. Box 149
Winnsboro, LA 71295

Primrose Oil Co., Inc.
c/o John Brin
11444 Denton Dr.
Dallas, TX 75229

Appendix B

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

IN RE: STEVE D. THOMPSON TRUCKING, INC.

NO. 89BK-12115

BILLY R. VINING, TRUSTEE

VERSUS

NO. 91AP-1047

PRIMROSE OIL CO., INC.

ORDER

The above Joint Motion to Fix Interest having been considered:

IT IS ORDERED that the report and recommendation issued in connection with this matter be and it is hereby amended to recommend that there be judgment in favor of Billy R. Vining and against the defendant, Primrose Oil Co., Inc., in the principal sum of Nine Thousand Sixty and 28/100 ($9,060.28) Dollars, together with interest accumulated thereon through June 5, 1990, in the total amount of One

Appendix B

Thousand Two Hundred Fifty-one and 70/100 ($1,251.70) Dollars, and interest on the principal balance of $9,060.28 at the rate of 5.5% per annum from June 5, 1990, until paid.

THUS DONE AND SIGNED in Monroe, Louisiana, on this, the 18th day of December, 1991.

s/Stephen V. Callaway
JUDGE

APPROVED AS TO FORM:

s/E. Eugene Hastings
E. Eugene Hastings

s/Louis D. Smith
Louis D. Smith

Copy Sent:
Date: 12/23/91
By: TD
To: Per Attached

Appendix B

Notice sent to:

Michael E. Kramer
604 Kinloch St.
Winnsboro, LA 71295

Joseph T. Bambrick, Jr.
529 Reading Ave.
West Reading, PA 19611

Louis D. Smith
P. O. Box 8032
Monroe, LA 71211-8032

Stephen J. Katz
411 S. Washington St.
Bastrop, LA 71220

E. Eugene Hastings
P. O. Drawer 2808
Monroe, LA 71207-2808

Steve D. Thompson Trucking
P. O. Box 149
Winnsboro, LA 71295

Primrose Oil Co., Inc.
c/o John Brin
11444 Denton Dr.
Dallas, TX 75229

Judgment Log 91-1047

Case Record

Appendix C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

BILLY R. VINING, TRUSTEE

VERSUS NO. 91-2542

PRIMROSE OIL CO., INC.

JUDGMENT

The report and recommendation issued by the United States Bankruptcy Court for the Western District of Louisiana in connection with this proceeding having been considered together with the joint motion to fix interest and the order approving the said joint motion, no timely objection to the said report and recommendation having been made;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that there be judgment in this adversary proceeding in favor of Billy R. Vining, Trustee of Steve D. Thompson Trucking, Inc. and against defendant, Primrose Oil Co., Inc., in the principal sum of Nine Thousand Sixty and 28/100 ($9,060.28) Dollars, together with interest accumulated thereon through June 5, 1990, in the total amount of One Thousand Two Hundred Fifty-one and 70/100 ($1,251.70) Dollars, and interest on the principal balance of Nine Thousand Sixty and 28/100 ($9,060.28) Dollars at the rate of 5.5% per annum from June 5, 1990, until paid.

Appendix C

THUS DONE AND SIGNED in Monroe, Louisiana, on this, the 23rd day of December, 1991.

s/Donald E. Walter
JUDGE

Judgment Entered: 12/30/91
By: Brenda Schlayhall
Copy To:

Katz	Bambrick
Kramer	Bk Ct
Hastings	U S Tr
Smith	Judge Callaway

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

BILLY R. VINING, TRUSTEE

VERSUS

No. 91-2542
No. 91 AP-1047

PRIMROSE OIL CO., INC.

PETITION FOR LEAVE TO FILE NOTICE OF APPEAL NUNC PRO TUNC

YOUR PETITIONER, PRIMROSE OIL CO., INC., by and through its Counsel, JOSEPH T. BAMBRICK, JR., ESQUIRE, hereby files this Petition for Leave to File Notice of Appeal *Nunc Pro Tunc* and avers the following:

1. The matters with the above-assigned case numbers arise from a single case in Bankruptcy in this District, No. 89BK-12115.

2. The Clerk's Office of this Honorable Court inadvertently and mistakenly assigned two separate case numbers, specifically 91-2542 and 91-2565, relative to two

aspects of this same case when these two aspects came before this Honorable Court,

3. Docket No. 91-2542 related to the fixing of interest in the underlying case.

4. Docket No. 91-2565 related to Bankruptcy Case Nos. 89BK-12115 and 91AP-1047 and concerned the central factual issues to be resolved in this matter.

5. The interests of judicial economy and justice will be served if the two case numbers are consolidated for purposes of appeal to the Fifth Circuit United States Court of Appeals.

6. The time period for filing a Notice of Appeal will shortly expire in one or both cases.

7. Because of the extreme confusion concerning the precise docket numbers in this matter, Petitioner PRIMROSE OIL CO., INC. hereby requests this Honorable Court grant leave to file a Notice of Appeal of the final orders in both cases to the Fifth Circuit, a copy of which proposed Notice of Appeal is attached hereto and made a part hereof.

WHEREFORE, Petitioner PRIMROSE OIL CO., INC. hereby respectfully requests that this Honorable Court grant Petitioner leave to file a Notice of Appeal *nunc pro tunc* for the foregoing reasons.

Appendix D

BY:s/Joseph T. Bambrick

JOSEPH T. BAMBRICK, JR., ESQUIRE
Attorney for Petitioner
529 Reading Avenue
West Reading, Pennsylvania 19611
Phone 215/372-6400
Attorney ID No. 45112

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

BILLY R. VINING, TRUSTEE

VERSUS

No. 91-2542
No. 91AP-1047

PRIMROSE OIL CO., INC.

ORDER

AND NOW, this 28th day of January, 1992, upon consideration of the Petition for Leave to File a Notice of Appeal *Nunc Pro Tunc* and upon motion of JOSEPH T. BAMBRICK, JR., ESQUIRE, attorney for PRIMROSE OIL CO., INC. IT IS HEREBY ORDERED AND DECREED that leave is hereby granted to PRIMROSE OIL CO., INC. to file its Notice of Appeal with regard to the above cases.

THE COURT:

s/Donald E. Walter

Appendix E

Copy Sent:
Date: 1/30/92
By: dh
To: COA
Judge Walter
A. Carroll
S. J. Katz
E. E. Hastings
M. E. Kramer
L. D. Smith
J. T. Bambrick, Jr.
Bankruptcy Court
U. S. Trustee

Appendix F

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-4114

IN THE MATTER OF:
STEVE D. THOMPSON TRUCKING, INC.,
Debtor

PRIMROSE OIL CO., INC.,
Appellant

VERSUS

STEVEN D. THOMPSON TRUCKING, INC.,
Appellee.

Appeal from the United States District Court for the Western District of Louisiana

---

CLERK'S OFFICE:

Pursuant to Local Rule 42.3, the appeal was duly entered dismissed for want of prosecution for failure of

appellant to file a brief within the time fixed by the rules, this 8th day of April, 1992.

GILBERT F. GANUCHEAU
Clerk of the United States Court
of Appeals for the Fifth Circuit
By: s/Sarah L. Holms
Deputy Clerk

FOR THE COURT –
BY DIRECTION

Appendix G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4114

STEVE D. THOMPSON TRUCKING, INC.,
Debtor

BILLY R. VINING, TRUSTEE
Appellee,

VERSUS

PRIMROSE OIL CO., INC.,
Appellant.

Appeal of Decision of the United States District Court
for the Western District of Louisiana at Monroe

ORDER

Appendix G

Pursuant to FRAP 27.1.14 the appeal of the Appellant is reinstated.

GILBERT F. GANUCHEAU
Clerk of the United States Court
of Appeals for the Fifth Circuit

By: _____
Deputy Clerk

FOR THE COURT –
BY DIRECTION

Appendix H

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4114

Summary Calendar

IN THE MATTER OF:
STEVE D. THOMPSON TRUCKING, INC.,
Debtor,

PRIMROSE OIL CO., INC.,
Appellant,

VERSUS

STEVEN D. THOMPSON TRUCKING, INC.,
and BILLY R. VINING, TRUSTEE,
Appellees.

Appeal from the United States District Court for the Western District of Louisiana (91-CV-2542)

Before GARWOOD, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

Appendix H

PER CURIAM:[1]

Primrose Oil Company, Inc., appeals an adverse summary judgment on the trustee's action to collect the difference between shipping rates negotiated between Primrose and debtor Steve D. Thompson Trucking, Inc., and the rates filed by Thompson with the Interstate Commerce Commission (ICC). The district court entered judgment in the principal amount of approximately $9,000, together with interest, based on the bankruptcy judge's report and recommendation containing proposed findings of fact and conclusions of law pursuant to Bankruptcy Rule 9033(a).

In 1986, Thompson agreed to provide motor carrier transportation services to Primrose at rates "that would 'meet or beat' existing rates for ... competing carriers." Thompson, in August 1989, filed for protection under Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 1101 *et seq.*; and the case was converted to a Chapter 7 proceeding, 11 U.S.C. § 701 *et seq.*, that October. The Chapter 7 trustee filed an adversary proceeding in March 1991 against Primrose, seeking to collect the difference between the negotiated and filed rates. Primrose responded, *inter alia*, that the filed rates were unreasonable.

---

1 Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

That June, Primrose moved the bankruptcy court to stay the adversary proceeding and refer it to the ICC for a determination of the reasonableness of Thompson's filed rates. The motion was denied that July, and the trustee moved that August for summary judgment. Following a hearing that October, the bankruptcy court announced that it considered the action a non-core proceeding pursuant to 28 U.S.C. § 157(c)(1). Accordingly, it stated that it would issue a report and recommendation with proposed findings and conclusions pursuant to Rule 9033(a), including a recommendation that the trustee's motion be granted.[2]

The bankruptcy judge issued his report and recommendations in November 1991, with the following standard admonition:

> Pursuant to Bankruptcy Rule 9033(b) failure of the parties to request reconsideration and to file specific written objections with the Clerk of Court within the delays set forth in Bankruptcy Rule 9033 will result in a judgment in accordance with this Report and Recommendation being ordered by the District Court.

---

2 The bankruptcy judge recommended that judgment be granted on the principal claim, but that a material fact issue remained on the amount of accumulated interest. In December 1991, the parties filed a joint motion requesting that the report and recommendation be amended to reflect an agreed amount of interest. Primrose emphasized that it did not, however, "in executing this joint motion, admit, concede, or stipulate to the findings of fact and law contained in the report and recommendation, *and reserves any and all rights which it has to object to the findings contained therein.*" (Emphasis added.) As discussed *infra*, however, Primrose never filed objections.

As the court clerk noted, the report was mailed to the parties on November 12.[3]

No objections were filed.[4] On December 26, the district court, noting that it had considered the report and recommendation, with "no timely objection to [it] having been made", entered judgment in favor of the trustee.

Primrose maintains that the district court erred in (1) granting summary judgment for the trustee, and (2) refusing to stay the proceedings and refer the issue of the reasonableness of Thompson's filed rates to the ICC.[5]

Based upon our review of the record, and no objections having been filed to the bankruptcy judge's report, we find no reversible error. Accordingly, the judgment is AFFIRMED.

---

3 "In non-core proceedings heard pursuant to 28 U.S.C. § 157(c)(1), the bankruptcy judge shall file proposed findings of fact and conclusions of law. The clerk shall serve forthwith copies on all parties by mail and note the date of mailing on the docket." Bankr. R. 9033(a).

4 Instead, on November 22, Primrose erroneously filed a notice of appeal to the district court from the report and recommendation. The notice states that the appeal was "from the final Order of the Bankruptcy Court entered in this adversary proceeding on ... November [8,] 1991." The report and recommendation, signed on November 8, was entered on November 12.

5 On June 1, 1992, Primrose moved to stay this appeal pending a decision by the United States Supreme Court in *In re Carolina Motor Express, Inc.*, 949 F.2d 107 (4th Cir. 1991), *cert. granted sub nom., Reiter v. Cooper* _____ U.S. _____, 112 S. Ct. 1934 (1992). The Supreme Court will consider the following question: "Does filed rate doctrine mandate that shipper must pay full tariff rate to insolvent carrier in rate undercharge collection before matter may be referred to ICC for determination of reasonableness of those rates?" 60 U.S.L.W. 3768 (U.S., May 19, 1992). This motion was DENIED.

Appendix I

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4114

IN THE MATTER OF:
STEVE D. THOMPSON TRUCKING, INC.,
Debtor

PRIMROSE OIL CO., INC.,
Appellant,

VERSUS

STEVEN D. THOMPSON TRUCKING, INC.,
and BILLY R. VINING, TRUSTEE,
Appellees.

**Appeal from the United States District Court
for the
Western District of Louisiana**

ON PETITION FOR REHEARING

(AUGUST 27, 1992)

Appendix I

Before GARWOOD, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

s/illegible

UNITED STATES CIRCUIT JUDGE